Supreme Court of the United States

OCTOBER TERM, 1920.

No. 555

THE TEXAS COMPANY,

Libelant-Petitioner,

against

HOGARTH SHIPPING CORPORATION, LTD., owner of the steamship *Baron Ogilvy,* and HUGH HOGARTH & SONS,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF.

HAIGHT, SANDFORD, SMITH & GRIFFIN,
Proctors for Petitioner.

JOHN W. GRIFFIN,
Counsel.

The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

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Notice of Petition for Writ of Certiorari.

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HOGARTH SHIPPING COMPANY, LTD., Owner of the Steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS,
Respondents.

No. .

Sirs:

Take notice that the annexed petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, will be presented to the Supreme Court of the United States at the opening of Court on October 4, 1920.

Dated, New York, September 6, 1920.

Yours, etc.,

HAIGHT, SANDFORD, SMITH & GRIFFIN,
Proctors for Petitioner.

To:

Messrs. KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Respondents.

Petition for Writ of *Certiorari*.

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THE TEXAS COMPANY,
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against

HOGARTH SHIPPING COMPANY, LTD., Owner of the Steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS,
Respondents.

No. .

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The Texas Company, a corporation duly organized and existing under the laws of the State of Texas and a citizen of the United States, in the above entitled cause respectfully alleges as follows:

I. This is a petition for a writ of *certiorari* to review a final conclusion of the United States Circuit Court of Appeals for the Second Circuit, which affirmed a decree of the United States District Court for the Southern District of New York, dismissing the libel in an admiralty suit for breach of charter.

II. The libel was based upon a rate charterparty executed in the City of New York on February 6, 1915, whereby one of the British steamships owned by the respondents (the particular vessel to be named later) was chartered by them to the petitioner for a voyage from Port Arthur, Texas, to a South African port with a full cargo of refined petroleum. Subsequently the steamship *Baron Ogilvy* was named. The respondents refused to perform the charterparty, and this suit was brought by the petitioner to recover its resulting damages.

The defense was, in substance, that the vessel had been prevented from performance by requisition of the British Government. The District Court upheld this defense and dismissed the libel. (Opinion, record, fols. 700-713; 265 Fed., 375). The Circuit Court of Appeals affirmed without opinion.

The charterparty is unusual in that it does not contain the clause common in shipping documents excepting restraints of princes, rulers and people. Since the contract was made while the war was in progress, this omission is especially worthy of notice. Not only did the charter omit this all but universal clause but it contained a special clause indicating that it was to be performed even though performance could not be rendered at the expected time. This clause reads as follows (fol. 456):

> "8. The lay days for loading are not to commence before April 15th, 1915, except with the consent of the Charterers or their Agents, and if the vessel is not ready to load by two o'clock P. M. on May 15th, 1915, the Charterers shall have the option of cancelling or maintaining this charter, their decision to be given at once,

> if the vessel be then at the loading port; but, if the vessel has not then arrived, their decision need not be given until 24 hours after arrival."

Under this clause, if the vessel should not be able to go to the loading port at the time anticipated, still it was her duty to report there for loading even at a later time. The charterer was given the option to cancel in case of delay but was of course not obliged to do so.

This was, therefore, an American contract, made in New York, between an American citizen and British citizens; it omitted the usual exception of restraints of princes, and contained the clause referred to above, which indicated that the shipowners (the respondents) were to carry out their contract at any time, even later than the expected time, unless the charterer, upon tender of the vessel to load, should elect to cancel.

The answers of the respondents alleged that, on April 10, 1915, while at London, the *Baron Ogilvy* "was requisitioned by the Government of t... Kingdom of Great Britain and Ireland for Government service, under and pursuant to the general prerogative of the British Crown and in pursuance of the Royal Proclamation, dated August 4, 1914" (fols. 29, 63). The answers further set forth that this alleged requisition constituted "a restraint of princes" (fols. 31, 64) and that by reason thereof the "charterparty became impossible of performance" (fols. 31, 65).

Certain other defenses were pleaded which were not sustained. These are dealt with in the petitioner's annexed brief, but it is not deemed necessary to discuss them in this petition.

The respondents' proof showed that the Royal Proclamation referred to in the answers purported to authorize the Lords Commissioners of the Admiralty

> "by warrant under the hand of their Secretary or under the hand of any Flag officer of our Royal Navy holding any appointment under the Admiralty, to requisition and take up for Our Service any British ship, etc." (fols. 613, 614).

No such proceeding as this was ever had. The alleged requisition consisted solely of a telegram sent to the respondents on April 10, 1915, by Mr. Ernest J. Foley, an Assistant Director of Transports in the service of the British Admiralty. This telegram read as follows:

> "Hogarth Glasgow SS *Baron Ogilvy* is requisitioned under Royal proclamation for Government service.
>
> TRANSPORTS."

This telegram was all that was ever done by way of requisition. A correspondence took place between the Admiralty and the respondents, as a result of which an agreement was entered into whereby, in place of the alleged requisition, the respondents chartered the vessel to the British Government, at a freight higher than the requisition rate, for a series of four trans-Atlantic voyages. As soon as this was done, the respondents wholly repudiated the charter and notified the petitioner (on April 12, 1915) that they would not perform it *at all.*

The four trans-Atlantic voyages for which the respondents chartered the vessel to the British Government were expected to take, and did take, about six months; and, on their conclusion, the vessel was released from Government service. This was in October, 1915 (Foley, fol. 253; Hogarth, fol. 193). The vessel was never tendered to the petitioner for service under the charter (Hogarth, fols. 193, 19). It further appeared that one term of the agreement between the respondents and the British Government was that the Government agreed to protect and indemnify the respondents against such claims as the present (fol. 179).

The petitioner urged in the courts below (1) that the contract was an obligation created by American law and sought to be enforced in an American court, and that it was no defense to say that the law of some other country, still less the act of the executive of some other country, could dissolve the obligation; (2) that this was not a case of "frustration," so called, for the record contains no evidence that the alleged requisition would probably last for an inordinately long period, and there is evidence to the contrary; (3) that the shipowners could not, by their own act, charter the ship to the British Government for voyages certain to occupy six months and then claim that they were prevented from performance by a requisition of the British Government; (4) that the omission of a restraint of princes clause showed that such risks as that of requisition were to fall upon the shipowner and not upon the charterer, especially since the charter was made long after the outbreak of the war; and (5) that, where a charter contains no such clause, but is an absolute covenant to perform, a Court cannot relieve the shipowners from

their obligation, even if foreign law interposes a delay in or a prohibition of performance. It has been a settled rule of law for more than a century, both in England and in this country, that prevention by foreign law does not excuse failure to perform a contract.

All of these contentions were overruled. The District Court held that the British Government did take and use the vessel and that such use was *in invitum* (fol. 704) and extinguished the respondents' liability under their contract with the petitioner. The Court seemingly took the view that the alleged requisition had the same effect as the loss of the vessel, and that a "destruction of the subject-matter" of the contract ensued (fols. 408, 409). The Circuit Court of Appeals gave no reasons for its conclusion.

The petitioner further urged that the alleged requisition was not in fact a requisition at all under British law, and introduced the evidence of a British legal expert to that effect. It will be noted that the answers pleaded the Royal Proclamation; the telegram of requisition purported to act under the Royal Proclamation; and yet the mode of requisition prescribed by the Royal Proclamation was not even approximately followed.

III. With the apparent purpose of foreclosing any discussion of this subject, the British Embassy appeared as *amious curiae* and offered a suggestion and certificate, which were received in evidence over objection (fols. 92-100, 113). They are printed at folios 124-131 of the record. They allege that the *Baron Ogilvy* was requisitioned by the British Government and was operated under its orders from April 10, 1915, to October 20, 1915, and they

call upon the Court to decline jurisdiction. The Court very properly asserted its jurisdiction (fols. 91, 92). It finally declined to pass on the effect of the documents produced by the British Embassy (fol. 704). The Circuit Court of Appeals affirmed without opinion; but in certain other cases it has treated such certificates as controlling (see Earn Line Steamship Company v. Sutherland Steamship Co., Ltd., 264 Fed., 276; *The Carlo Poma*, 259 Fed., 369; Agency etc. Co. v. American etc. Co., 258 Fed., at 368. It is therefore fair to conclude that the Circuit Court of Appeals gave the same conclusive effect to the suggestion and certificate in the case at bar. The facts recited in the documents in question were obviously not within the personal knowledge of the official signing them; nor, of course, was there any opportunity for cross-examination. Tested by any ordinary rule of evidence, they were hopelessly incompetent. To find them not merely admitted, but treated as conclusive is, to say the least, startling.

IV. The foregoing recital of facts is necessarily greatly condensed. The facts are more fully stated and discussed below in the petitioner's brief. Enough has, however, been said to indicate that serious and far-reaching questions are presented. Among them are these:

1. Where a charterparty containing no restraints of princes clause is executed in the United States, and its enforcement is sought by an American citizen in an American court, is it a defense to say that that performance has been prevented by British law or by the British executive?

2. Where an American charterparty of a British vessel, executed during a war in which Great Britain is involved, contains no restraints of princes clause, is a real or alleged requisition by the British Government any defense to suit in an American court by an American citizen for refusal to perform the charter?

3. Can any act of the British executive dissolve the obligation of an American contract?

4. Is the real or alleged requisition of a chartered vessel by the British Government analogous to "destruction of the subject-matter" of the contract so that the contract is ended?

5. Where a real or alleged requisition takes place and there is no evidence that its effect will be to postpone inordinately the performance of an existing charter, can the shipowner claim that the charter is dissolved by the mere fact of requisition?

6. Can a shipowner who makes a voluntary freight agreement with a government at a higher rate and for a prolonged period, in lieu of a real or alleged requisition for a period not fixed, but not shown to be likely to be prolonged, rely upon the real or alleged requisition to avoid performance of a pre-existing charterparty?

7. Where the defense of requisition by a foreign government is interposed, can the Ambassador of that government, by filing such a suggestion and certificate as are in this record, prevent an American court, at the instance of an American citizen, from ascertaining whether there was in fact such a requisition; and, thus, by his mere *ipse dixit*, conclusively prove facts manifestly beyond his per-

sonal knowledge and preclude all inquiry into them on the part of the Court?

8. Can such an Ambassador thus conclusively establish the fact and validity of an alleged requisition without being subject either to cross-examination or to the hearsay rule, even though the record contains uncontradicted evidence that the vessel was operated, not under requisition, but under a voluntary charter to his government? In short, is the Court bound to accept such an ambassadorial assertion even though it knows from the record before it that the assertion in question is incorrect?

9. Should the Court receive such a certificate and suggestion as a direct communication from the diplomatic officer of a foreign government, or should it insist that such communications be transmitted through the Department of State or the Department of Justice?

The foregoing questions are of great importance and have not been settled by any court of last resort. There have been numerous foreign requisitions which have affected American charterparties and which are now the subject of litigation. In view of the widespread requisition of tonnage by foreign governments during the war, it is most desirable that the highest authority should speak with regard to the rights of the many American charterers whose contracts are claimed to have been thus terminated.

The decision in the case at bar involves the overturning of the well settled rule that prevention by foreign law is not an excuse. It is, as shown in the petitioner's annexed brief, a departure from the authorities both in this country and in England.

The attempted analogy to destruction of the subject-matter, on which it is based, is plainly false and as plainly involves begging the question.

In numerous cases recently such certificates and suggestions as are in this record have been offered by foreign diplomatic officials and have met with varying receptions from various courts (see Brief, pp. 60, 62-67 *infra*). Some courts have received them and have treated them as conclusive; some have denied the right of a foreign official thus to restrict their inquiry; others have insisted that any such communication must be transmitted through the Department of State or the Department of Justice (see Brief, p. 62 *infra*). It is highly desirable that this Court should settle the proper practice with regard to the reception or rejection of such documents and with regard to the proper channel for their transmission; and it is even more important that the effect of such documents, if received, should be authoritatively declared by this Court.

It is respectfully submitted that the questions involved are of importance sufficient to warrant the granting of a writ of *certiorari* herein.

Certain other less vital questions are also raised —such as the following:

If a charter is made of a vessel to be named, and the vessel subsequently named becomes unavailable by reason of requisition, does any duty rest upon the shipowner to substitute another vessel?

If a vessel which is under charter is requisitioned does not the owner owe the charterer a duty to make reasonable efforts to secure her release or, failing that, to substitute another vessel?

V. The petitioner presents herewith a certified copy of the transcript of record of all the proceedings in the District Court and in the Circuit Court of Appeals herein.

Wherefore the petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued and will require the said Circuit Court of Appeals for the Second Circuit to certify the whole record and cause to this Court for consideration, and that this Court will decide the matters in controversy as prayed by the petitioner.

And your petitioner will ever pray, etc.

THE TEXAS COMPANY,
By W. A. THOMPSON, JR.,
Vice-President.

I hereby certify that I have examined the foregoing petition and that in my judgment it is well founded and is entitled to the favorable consideration of the Court.

JOHN W. GRIFFIN,
Counsel.

BRIEF FOR PETITIONER.

The Facts.

As already stated, the charterparty, which is printed in the record at pages 150 to 158, was executed on February 6th, 1915, at New York. The vessel chartered was not named, but was described as

"a first-class steam vessel owned by Messrs. Hugh Hogarth & Sons of Glasgow and name of vessel to be declared on or before March 15th, 1915, classed 100-A-1 at British Lloyd's or its equivalent and to be so maintained during the service."

The *Baron Ogilvy* was named on March 11th.

As also pointed out above, the charter constituted an absolute contract to carry the cargo and contained no restraints of princes clause, still less any clause making it void in case of requisition. This is most significant since, at the time of its execution, the war had been in progress for eight months; numerous vessels had already been requisitioned by the British Government; and the possibility of requisition cannot have been absent from the contemplation of the parties. Moreover, it specifically appears that war conditions were in their minds from the insertion in the charter of certain special clauses having to do with war conditions (fols. 468-473). These provided in substance that the ship should have the right to obey any orders given by the British Government as to routes and other incidents of the voyage; should be employed only in trades lawful for a British ship; should not carry cargo which would expose her to seizure by the

Allies; and should not violate any of the warranties in her war risk policies, which warranties provided in effect that the instructions of the British Government should be followed as to routes, ports of call, time of starting, etc., and that the ship should not enter a blockaded port (fols. 470-472).

In order to make the narrative of facts chronological, there is here inserted a brief summary of the correspondence showing the facts as to the agreement finally made between the respondents and the Admiralty.

On March 31st the respondents received an intimation that the vessel might be requisitioned (fol. 498). On April 1st an inquiry was made on behalf of the Admiralty (fol. 502) by Hogg & Robinson, the Admiralty's agents (Hogarth, fol. 147), for vessels

"capable of carrying from about 4,000 to 6,000 tons, measurement, of hay."

The letter goes on to say:

"they will be required on this service *for some weeks* and as the next vessel is wanted to commence loading at Belfast on the 6th instant or as soon after as possible, we shall be obliged if you will kindly send us a wire, on receipt, for the information of the Admiralty authorities." (The italics in the above and in the following extracts from this correspondence are ours.)

On April 6th, the respondents replied that their only vessel of the type in question in or shortly due in England was the *Baron Ogilvy* (fol. 515).

On April 9th, Harley & Company, who were ship brokers, telegraphed to the respondents as follows:

"*Baron Ogilvy.* Referring to Admiralty notice requisition we believe could induce them take her *instead* for 3 or 4 trips New Orleans Avonmouth or Liverpool £14 namely £13.10.0, 10 shillings gratuity. Shall we try to do so?"

On the same date, Harley & Company wrote the respondents as follows (fols. 522-523):

"With reference to notice of requisition by the Admiralty of this steamer, *we believe it would suit their purpose just as well if they were to charter her* for voyages from New Orleans to Avonmouth or Liverpool for Mules, at £13.10.0 and 10/. gratuity *for three or four trips* and we believe if you were to authorise us to approach them that we could arrange this matter.

The conditions of course would be the same that are obtaining in the case of your other steamers running under charter to the Admiralty for this mule business.

We await your views on the matter."

Also on April 9th, Messrs. Harley & Company addressed a letter to the Director of Transports reading as follows (fols. 532 to 534):

"*Baron Ogilvy.*

Now London expected discharged Monday.

With reference to your verbal notice of requisitioning this steamer, we beg to say that *if it would suit your purpose equally well to charter her for four trips* from New Orleans to Avonmouth or Liverpool for the conveyance of Mules, that *owners would be agreeable* (you nevertheless remaining responsible for any third party claims as under requisition) to undertake that employment on being paid freight at the rate of £13.10. per head of mule put on board, plus 10./ gratuity on the number landed alive.

Owners undertake all the fittings, foddering, electric light, wireless telegraphy, to supply attendants etc. in the usual manner as they are doing in the case of the other 'Baron' steamers at present under your employment, and they would do their best to carry out this work to your satisfaction.

In the event of your agreeing to this proposal the steamer would fit up at New Orleans to carry as much mules as possible under the supervision of your Officer there.

If this suggestion meets your approval we shall be glad of an early reply owing to the prompt position of the steamer in order that owners may make the necessary arrangements."

It will be noted that this is distinctly put forward as a proposition of *voluntary charter in lieu of requisition.*

On April 10th, the telegram constituting the alleged requisition which is quoted above (p. 5) was sent to the respondents. On the same day Harley & Company wrote to the Director of Transports a letter proposing a charter for four trips New Orleans to Avonmouth or Liverpool, which was practically a copy of their letter of April 9th quoted above. It contained, however, the following postscript (fol. 551):

"We estimate this steamer's position would be as under

1st	voyage	ready	New Orleans		about 16th May
2nd	"	"	"	"	about 30th June
3rd	"	"	"	"	about 15th August
4th	"	"	"	"	about 1st October."

It is therefore plain that this proposal was made with deliberate knowledge that it would be the end of October before the vessel could complete the four voyages.

This offer was accepted by the Director of Transports in a telegram dated April 10th and reading as follows:

"Your offer *Baron Ogilvy* four voyages conveyance of mules New Orleans to Avonmouth or Liverpool freight thirteen pounds ten shillings per head gratuity ten shillings each animal landed alive is accepted stop please say when and where ship can be inspected."

On April 12th the respondents wrote Harley & Company that they noted the acceptance of the proposed mule charter by the Admiralty and that they were accordingly proceeding to fit the vessel for the service. The formal letter of confirmation from the Director of Transports appears at folios 568 to 572. The material portion of it reads as follows:

"With reference to your letter of the 10th instant and in confirmation of my telegram of the same date, I beg to inform you that your tender of the S.S. *Baron Ogilvy* is accepted for the conveyance of 672 mules from New Orleans to Avonmouth or Liverpool for four voyages, the first homeward sailing to be about 16th May."

Hogarth, the respondents' manager, testified that the *Baron Ogilvy* was employed by the Government under "a special bargain" (fol. 177). One term of it, by the way, was that the Government undertook to indemnify the owners against claims on the vessel's commitments (fol. 179).

On the same day (April 12th) the respondents repudiated the petitioner's charter. This was done by a letter written to the petitioner by the respondents' agents in New York giving notice, not that

performance of the charter would be delayed, but that it would not be performed *at all*. The letter read as follows (fols. 102-103):

"*Baron Ogilvy.* Referring to this steamer's charterparty, dated at New York February 6th, 1915, kindly be advised that we are this morning in receipt of the following cable from Glasgow:

'*Baron Ogilvy* requisitioned.'

This means that the steamer has been commandeered by the British Admiralty and will therefore not be able to carry out charterparty with you."

Hogarth testified (fol. 193) that he considered that he had "no liability to the Texas Company."

The charter being thus repudiated, the libelant proceeded to secure other tonnage (Answer to Second Interrogatory, fol. 104).

The terms thus secured for the mule trade were more favorable to the respondents than the regular requisition rate. The latter was 11 shillings per deadweight ton per month on a time charter basis (fol. 211). The respondents clearly expressed their preference for the freight payable for carrying mules (fols. 120, 557). This netted, according to Hogarth (fols. 211, 212), £100 to £200 a month more than the regular 11 shilling rate.

The carriage of the mules under the agreement thus reached with the Admiralty was evidently more profitable to the respondents than the petitioner's charter would have been. Under the petitioner's charter, the vessel would have carried 180,000 cases of oil (Hogarth, fol. 211), at the charter rate of 47 cents per case (fol. 452), thus earning $80,600 in a period estimated by Hogarth (fol. 164) at three and one-half months — say $23,000 gross per month. At the end of the voyage

the vessel would have been in the remote ports of South Africa. Under the mule charter, the vessel actually carried on her four voyages 804, 902, 903 and 904 mules respectively—a total of 3,513. This made a total freight, at £14 a head, of £49,182, or $236,073.62, taking the exchange at $4.80. The voyages occupied about seven months. The monthly earnings were therefore $33,724.80; about $10,500 per month or over $310 per day in excess of the sums which would have been earned under the petitioner's charter. Also war risk was carried by the Government (fol. 214). While it is quite true that out of this the respondents paid for fittings, attendants and fodder, it seems perfectly clear that the net return far exceeded that under the petitioner's charter—to say nothing of the advantage of having the vessel in North Atlantic waters at the expiration of the service. Certainly the above figures show that Hogarth's testimony that he would have made "infinitely more" (fol. 164) under the petitioner's charter, and that he sustained "a very great loss" (fol. 212) in the Admiralty's service is wholly incorrect.

It is also plain that the petitioner's charter was below the market, since on April 14th it cost the petitioner 66 cents per case to secure other tonnage (fol. 445), as against the rate of 47 cents in the *Baron Ogilvy's* charter. Altogether, it is clear that the petitioner's charter could have had few attractions for the respondents.

Five things appear from the foregoing testimony and correspondence: (1) The vessel was employed, not technically under requisition, but under a voluntary charter. (2) Her freight rate with the Admiralty was in excess of the usual requisition

rate and in excess of the petitioner's charter rate. (3) The only intimation as to the probable length of the service under requisition is that contained in the letter of April 1st, 1915, quoted above, in which the Admiralty's representatives state that vessels were desired to carry hay "*for some weeks*" and to load at Belfast April 6th or shortly after. (4) The vessel's cancelling date was still five weeks off. (5) The respondents at their own instance made a charter which they *knew* was going to last at least until the end of October, thereby making it certain that the vessel, instead of being released at the end of "some weeks" (which might mean three or four weeks), was going to be retained for at least six and one-half months. Having thus deliberately made an arrangement which irrevocably tied up their vessel for six or seven months (but which had the advantage of giving them better freights), they informed the petitioner that they were not going to perform the charter sued on. This information was given by letter dated New York, April 12th, and was presumably based on a cable sent from London on the 11th, the very day after the charter to the Admiralty had been concluded.

The foregoing statement has been made in order that all the facts might be before the Court. It is, however, desired to make entirely plain that the chief question of the case—*i. e.*, whether this American contract could be extinguished by any action of British officials—does not at all depend upon the peculiar facts regarding the respondents' voluntary charter to the British Government. The respondents' defense, sustained below, that a requisition did take place and that its effect was to extinguish the obligation of the charter, presents the main question. In other words, two distinct points arise:

(1) Even if there was a requisition, did it extinguish the obligation of the charter? (2) Was there any real requisition? The Courts below answered both of these questions in the affirmative.

POINTS.

FIRST.

The charterparty contains no restraints of princes clause or other appropriate exception. In the absence of such a provision, the general rule is that the obligation of the shipowner is absolute and that prevention by foreign law is not an excuse.

1. Where a shipowner enters into an absolute covenant to carry a cargo, without protecting himself by exceptions, he is of course bound to perform it. The practice of embodying certain exceptions in contracts of carriage is so common that one almost unconsciously assumes that a carrier is not liable for non-performance due to causes commonly covered by exceptions. Nevertheless, the law both in this country and in England is plain that the carrier is liable on his covenant unless he has protected himself by exceptions. Indeed, if this were not true, there would be no object in having exceptions.

An examination of the charter in suit (Record, pp. 150-158) shows that it contains no exception whatever applicable to the situation. The respondents in their answers (fols. 23-28) undertake to

set up certain clauses attached to the charter for insurance purposes, none of which, however, cover this case. It is, for example, provided (fol. 468) that bills of lading issued for the cargo shipped under the charter shall contain a clause permitting the ship to comply with the orders of the British Government or of the War Risk Insurance with regard to routes, times of sailing, etc. These provisions do not purport to cover a refusal to sail at all, and obviously they have no effect anyway, since no bills of lading were ever issued.

The other conditions referred to appear at folios 470-473 and are to the effect that the vessel's trades must be such as are lawful for British ships; that she shall not be used for such cargo as would expose her to seizure or condemnation by the Allies; and that there shall not be any breach of the warranties contained in the vessel's war risk policies, namely, that she shall comply so far as possible with the orders of the British Government and of the War Risk Insurance Committee with regard to such details of the voyage as route, ports of call and stoppages; that she shall not sail if ordered not to; that she shall leave enemy ports within the days of grace allowed by the enemy; and that she shall not enter a blockaded port. Obviously none of these provisions apply to the present case, and the District Court properly so held. Judge Hough said (fols. 702-703):

"The parties executed a charterparty containing no restraints of princes clause—and (as I construe the document) no other clause or rider thereof authorizing either party to invoke the line of decisions construing and enforcing that phrase."

The following cases show the extent of the carrier's liability under these circumstances:

In *Spence* v. *Chodwick*, 10 Q. B., 517, certain goods were shipped by the plaintiff on the defendant's vessel from Gibraltar for London. There were certain exceptions not including restraints of princes. The declaration alleged shipment and non-delivery; the defendant pleaded that the goods had been seized and condemned by the Spanish authorities. This plea was held bad on demurrer. The Court said per Patteson, J., at page 528:

"The defendant's contract is to carry the plaintiffs' goods to London and he is liable for non-performance of his contract unless its performance was prevented by some of the exceptions provided against or by the act of the plaintiffs themselves or by the law of this country."

Per Wightman, J., page 530:

"The defendant here was prevented by unavoidable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency; he has not done so and is without excuse."

This decision was followed in *Jacobs* v. *Credit Lyonnais*, L. R. 12 Q. B. D., 589 (more fully discussed below), and was approved by this Court in *Howland* v. *Greenway*, 22 How., 491, where a shipment of cargo was made at New York for Rio de Janeiro and was not delivered because it was seized by the Brazilian authorities in consequence of the master's failure to comply with the local customs regulations. This Court held that the shipowners' liability was absolute, saying:

"Their contract is an absolute one to deliver the cargo safely, *the perils of the sea only excepted.* Under such a contract *nothing will excuse them for a non-performance except they have been prevented by some one of these perils, the act of the libelant or of the law of their country.* No exception of a private nature which is not contained in the contract itself can be engrafted upon it by implication as an excuse for non-performance."

The opinion refers to *Spence* v. *Chodwick*, *supra*, with approval for the proposition that:

"When a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may notwithstanding any accident by inevitable necessity because he might have provided against it by his contract."

In *The Harriman*, 9 Wall., 161, a vessel was chartered to carry a cargo of coal from San Francisco to certain South American ports to be named. Valparaiso was named. The coal was in fact destined for the Spanish navy. When the vessel reached South American waters, the Spanish navy had departed for an unknown destination, and the master returned to San Francisco. This Court held the shipowner liable, saying:

"*The existence of the war was known to both parties when the contract was entered into. The owner made no provision against any contingency.* His engagement was simple, direct and unconditional that the vessel should proceed to Valparaiso. The presence or absence of the consignee was immaterial. * * *

The answer to the obligation of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts, not to make or mod-

ify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function."

So, where by force of foreign law a charterer is unable to furnish cargo at the loading port, he is liable, unless the contract contains a proper exception.

Blight v. *Page*, 3 Bos. & P., 295.
Barker v. *Hodgson*, 3 Maule & S., 271.

In *Ashmore* v. *Cox*, L. R. 1899, 1 Q. B. D., 436, the contract was for shipment of 250 bales of Manila hemp at a certain time. Owing to the Spanish-American War, the shipment could not be made at the time fixed, but the seller was held liable in damages for his failure to ship. The Court (Lord Russell, C. J.) said:

"On behalf of the defendants it was also contended that they were excused from the fulfillment of the contract on the ground of impossibility of performance. This contention was divided into two heads. First, it was said that it was an implied condition of the contract and therefore not depending upon the express words of the contract, that it should be possible to ship between the named dates by sailer or sailers. * * *

The defendants have taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract and appropriating to the contract 250 bales of the commodity shipped by sail or sailers between May 1st and July 31st, 1898. They have taken upon themselves (subject to the concluding clause of the contract) the responsibility that those events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. I therefore hold that there was no such implied condition."

This decision has recently been approved by the Court of Appeal in *Blackburn Bobbin Co.* v. *Allen*, 23 Com. Cas., 472.

So, too, in *Sun Printing Asso.* v. *Moore*, 183 U. S., 642, this Court said that it was a well settled rule of law that if a party by his contract has charged himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party.

This passage was recently quoted with approval in *Carnegie Steel Co.* v. *United States*, 240 U. S., at 165.

In *Chicago, Milwaukee etc. Ry. Co.* v. *Hoyt*, 149 U. S., at 14, this Court said:

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or to pay damages for the non-performance, *and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract*, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

In commenting on the above language, this Court in *Columbus Railway & Power Co.* v. *Columbus*, 249 U. S., 399, at 412, said:

"Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. United States v. Gleason, 175 U. S. 588, 602, and authorities cited; Carnegie Steel Co. v. United States, 240 U. S. 156, 164, 165."

It is obvious enough that in the present case the event which occurred could readily have been anticipated and guarded against in the contract.

Numerous other decisions to the same effect might be cited; for example, *Ingle* v. *Jones,* 2 Wall., 1, where a builder failed to complete his work as agreed because of a latent defect in the soil upon which the foundation rested which made it necessary to take down and rebuild a considerable part of the building. This Court said:

"This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building 'fit for use and occupation.' It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law, that if a

party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. Beebe v. Johnson, 19 Wend., 500; Paradine v. Jayne, Alleyn, 27; Beal v. Thompson, 3 Bos. & P., 420; 3 Com. Dig., 93."

So in *United States* v. *Gleason*, 175 U. S., 588, at 602, this Court said:

"While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose. Dermott v. Jones, 2 Wall. 1, sub. nom. Ingle v. Jones, 17 L. ed. 762; Cutter v. Powell, 6 T. R. 320, 2 Smith, Lead. Cas. 7th Am. ed. 1."

In *Berg* v. *Erickson*, 234 Fed., 817, the Circuit Court of Appeals for the Eighth Circuit reviewed the authorities at length and there held that an unusual drought did not relieve from a contract to furnish grass for cattle, there being no exception covering the case.

In *Rederiaktiebolaget Amie* v. *Universal Transp. Co., Inc.*, 250 Fed., 400, the Circuit Court of Appeals for the Second Circuit said:

"No action of the Swedish Government would excuse the defendant from its covenant to do so" (*i. e.*,

to deliver a bill of sale), "there being no exception in the agreement like that common in charterparties and bills of lading of arrests and restraints of princes."

A recent case on the subject in New York is that of *Richards* v. *Wreschner*, 174 N. Y. App. Div., 484, where a contract made in this country by a German firm to deliver in this country merchandise manufactured in Germany was held, in the absence of a proper exception, not to be excused by the outbreak of war between Germany and Belgium. The Court adopted the statement of the New York Court of Appeals in *Cameron-Haven Realty Co.* v. *City of Albany*, 207 N. Y., 377, as follows:

"When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it because he promised it and did not shield himself by proper conditions or qualifications."

The converse case is illustrated by *Furness, Withy & Co.* v. *Rederi Banco*, 23 Com. Cas., 99, where a Swedish ship was chartered to an English firm by a charter made in England and containing an exception of restraints of princes. According to Swedish law, the vessel could not lawfully perform the charter because under it she was to carry cargo between two ports both lying outside of Sweden. The Court held that this law constituted a restraint of princes within the meaning of the exception and that therefore the owner was not liable; but it is made clear in the opinion that, if the exception had been absent, the decision would have been to the contrary. The Court said at page 103:

"It is conceded by Mr. Dunlop, and is, I think, quite clear law, that *the mere fact that a contract is illegal by the law of a foreign State to which one of the contracting parties is a subject will not make that contract illegal or unenforceable if it is an English contract to be construed according to English law and to be enforced according to the law of this country.* Therefore, if it were not for the exception of restraint of princes, the Swedish owners in this case could not rely upon the fact that this charaterparty is illegal according to Swedish law. But the charterparty contains the exception of restraint of princes."

In short the law has long been settled to the effect that, where there is an absolute obligation, difficulty or even impossibility of performance is no defense, except in cases of personal disability preventing performance of a contract for personal service, destruction of the subject-matter upon the continued existence of which the contract depends, and prohibition by domestic law.

There is no question here of the first or the third of these alternatives. The District Court sought to bring the case within the second, and in its opinion (fols. 708, 709) argued that "for the purposes of this suit, the *Ogilvy* was or became non-existent."

This suggestion is more fully discussed below (pp. 38, 39). It will suffice at this point to say that the ship did not cease to exist, any more than if she had stranded, or had had a collision, or had encountered any other obstacle. She was merely subjected to a restraint (assuming that the requisition was valid) of a kind not excepted in the charter and not permanent in its nature. Such a situation cannot possibly be treated like a case where the ship has been destroyed. It is simply a case where

performance has been rendered impossible for the moment by foreign law.

2. It seems hardly necessary to go into an extended discussion of the principle which has been settled so long and so definitely, that prevention of performance by foreign law is no excuse. This contract was an American contract made in New York and deriving its obligation from the law of the State of New York. This Court is an American court asked to enforce the contract. The performance of the contract was to begin in this country. The defense is that the law of another country, to wit, Great Britain, has interposed an obstacle. It makes no difference whether that law is a municipal regulation, an act of Parliament, an order in council or a so-called prerogative of the Crown. It is immaterial whether the law is British or French or Russian. If it be suggested that the fact that the cargo was to be discharged in British South Africa affects the question, the answer is found in the words of Mr. Justice Willes, in *Lloyd* v. *Guibert*, 6 Best & S., 100, where a contract of carriage required discharge at Liverpool. The Court held that the law of England as the place of discharge did not govern the case because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby." This passage is quoted and relied upon by this Court in *Liverpool* v. *Great Western Co.* (the *Montana*), 129 U. S., 397.

See too *China Mutual Ins. Co.* v. *Force*, 142 N. Y., 90.

The case at bar simply presents another instance of the prevention by foreign law of the performance

of an American contract—the same question which has so often and so uniformly been decided by the courts both of this country and of England. The law is that if a foreign Government says to one of the parties to a domestic contract: "We will not let you perform your obligation," the domestic court will say, "We do not recognize that a foreign power may destroy the obligation of our contracts and deprive our citizen of the benefit of his bargain. The contract must be performed or damages must be paid."

The text writers are unanimous in laying down the rule that prevention by foreign law is no excuse. The following quotations from standard works will suffice:

8 *Elliott on Contracts*, par. 1891:

"Impossibility of performing a contract caused by a foreign law is no excuse for non-performance."

2 *Parsons, Contracts*, 9th ed., p. 828:

"It would seem that a prevention by the law of a foreign country is no excuse, because this does not make the act unlawful in the view of the law which determines the obligation of the contract."

Leake, Contracts, 6th ed., p. 510:

"An impossibility caused by foreign law or by the act of a foreign state does not discharge a contract in this country."

To the same effect:

Wald's Pollock on Contracts, 3rd ed., p. 530.

Williston, Sales, Sec. 661.

Scrutton on Charterparties, 9th Ed., page 11:

"If performance of the contract is rendered impossible by foreign law, a party cannot plead impossibility or illegality as a defense to a claim for breach of contract."

In the recent case of *Richards & Co.* v. *Wreschner*, 174 N. Y. App. Div., 484, at 488 (referred to at p. 29, *supra*), it is said:

"It is well settled that impossibility due to foreign law is no excuse."

The adjudicated cases to the same effect are many.

In *Kirk* v. *Gibbs*, 1 H. & N., 810, a charterparty provided that the vessel was to proceed to a Peruvian port, and there get a required pass and load a cargo of guano. Owing to the law of Peru, the defendant could not get the pass except for a part cargo. It was held that this was no excuse. The Court said:

"The obligation was on the defendant to get the pass."

In *Barker* v. *Hodgson*, 3 M. & S., 267, the charterer was to furnish a cargo at a certain Spanish port, but was prevented from doing so because all intercourse with the port was forbidden owing to an epidemic. Impossibility of performance by reason of this law was pleaded, but the Court said:

"If, indeed, the performance of the covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and the defendant, inasmuch as he had been thus compelled to abandon the contract, would

have been excused for the non-performance of it, and not liable for damages. But if in consequence of events which happened at a foreign port, the freighter is prevented from furnishing or loading that which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer in damages."

In *Benson* v. *Trundy*, 13 Md., 20, a charterer was held liable for failing to furnish a cargo of guano from Peru in spite of the fact that its export was forbidden by the Peruvian Government. The Court followed the English rule as laid down in *Barker* v. *Hodgson*, 3 Maule & S., 267, basing the liability on the fact that the contract "contains no saving clause to meet the contingency" (p. 52).

And in *Clifford* v. *Watts*, L. R. 5 C. P., 577, 586, the Court commented on *Barker* v. *Hodgson*, saying, per Willes, J.:

"If the intercourse with the foreign port had been prohibited by the law of this country, the act would have been illegal, and the defendant would have been excused, not because he could not, but because he ought not to do it. But, where the performance of the thing covenanted to be done is not made impossible by the law of this country, the case falls within the principle laid down in the leading case of Paradine v. Jane, where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, and his plea was held insufficient."

In *Hare* v. *Whitmore*, 2 Cowp., 784, it was held that a foreign embargo would not excuse a breach of a warranty to sail by a certain date. In *Atkinson* v. *Ritchie*, 10 East., 530, it was held that a foreign embargo was not a defense for breach of a contract to load.

In *Blight* v. *Page*, 3 Bos. & P., 295, where the defendant had agreed to load a full cargo of barley at Libau, Russia, it was held no defense to an action for freight that the Russian Government forbade the export of barley. To the same effect is *Sjoerds* v. *Luscombe*, 16 East, 201, where the Court said:

"if the freighter undertake what he cannot perform, he shall answer for it to the person with whom he undertakes."

In *Jacobs* v. *Credit Lyonnais*, L. R. 12 Q. B. D., 589, 20,000 tons of Algerian esparto were to be shipped by a French company. There was an insurrection in Algeria and the transport of esparto was forbidden. This would have been a defense under French law; but the Court held a plea setting forth these facts to be bad on demurrer.

The American cases, some of which have already been referred to, are to the same effect.

In *Duff* v. *Lawrence*, 3 Johnson's Cas., 162, where loading was prevented by war, Kent, J., said, page 172:

"If, therefore, the prohibition in question had arisen from our own Government either before or after the commencement of the voyage, it would have dissolved the contract. But as it arose from the government of another country, it does not dissolve, nor absolutely excuse the performance of the contract, because the laws of one nation do not give effect to the positive institutions of another inconsistent with its own."

In *Holyoke* v. *Depew*, 2 Ben., 334, Fed. Cas. No. 6652, a vessel was chartered for a voyage to the Canary Islands and return, the charter containing no restraints of princes clause. The authorities at

the Canaries would not permit the vessel to load unless she would first go to Spain for quarantine, which the master refused to do. *Held* (Blatchford, J.) that the owner was liable, because, there being no restraints clause, he had made an absolute engagement to take the cargo and could not plead the act of the authorities as an excuse. The Court said:

"In the absence of any clause exempting the vessel from liability because of the restraints of rulers and princes, I think the fault was hers in not being in a condition to receive the barilla, and that her owners and not the charterer must bear the loss. Ogden v. Graham, 31 L. T. Q. B. pt. 2, p. 29; Spence v. Chodwick, 10 Q. B. 528; Brooks v. Minturn, 1 Cal. 484."

In *Beebe* v. *Johnson*, 19 Wend., 500, the defendant sold to the plaintiff certain patent rights, agreeing to perfect them in England so as to secure to the plaintiff the exclusive rights in Canada. This could not be done because by the British law such exclusive rights could be granted only to British subjects. It was held, however, that this foreign law was no defense.

See, too, *Ye Seng Co.* v. *Corbitt*, 9 Fed., 423-430, where a shipowner had entered into a contract to carry coolies from China to the United States and it was held no defense that the Chinese authorities refused to permit the vessel to carry passengers.

In *Tweedie Trading Co.* v. *MacDonald*, 114 Fed., 985, the contract was to carry laborers from Barbadoes to Colon on four separate trips. After two trips had been made the Government of Barbadoes forbade the further carriage of laborers. It was held that this was no excuse to a suit for the charter money. The Court said (p. 988):

"Prevention by the law of a foreign country is not usually deemed an excuse when the act which was contemplated by the contract was valid in view of the law of the place where it was made and *a fortiori* when it was also then valid at the place of performance."

The cases of *Spence* v. *Chodwick* and *Richards & Co.* v. *Wreschner* have already been referred to (pp. 23, 29, *supra*). The latter is cited with approval by the Circuit Court of Appeals for the Ninth Circuit in *Swayne* v. *Everett*, 255 Fed., 71, at page 74, where the Court says:

"At the time of the occurrences in question, England and Germany were at war, but the United States was not; on the contrary, this country was then observing strict neutrality between those belligerents. How, then, can it be properly held that the performance of the clear legal duty of an American carrier to receive and transport goods tendered for carriage by an American citizen is excused on the ground that the British government had forbidden its citizens and corporations, one of which happened to be the agent of the American carrier, from receiving the tendered freight and providing for its transportation? Such is not the law as we understand it. See Richards & Co., Inc. v. Wreschner, 174 App. Div., 484, and the numerous cases there cited."

So here the right of an American citizen to have his contract performed is not destroyed by the fact that a foreign government has instructed the other party to the contract not to carry it out. The respondents did not guard themselves against that contingency and the loss should fall on them.

The foregoing authorities indicate what has always been considered clear law—that, in the absence of an exception in the contract, the interfer-

ence of a foreign government preventing the performance of the contract is not a legal excuse. This is well settled both in England and in this country.

As already pointed out, the District Court sought to bring the case within the authorities by calling it a case where the vessel was non-existent. This is a mere figure of speech. It might equally well be said that where there is an embargo preventing the loading of a cargo, that cargo is non-existent, and yet in case after case it has been held that liability exists under such circumstances. Indeed, any case of impossibility might be stated in similar figurative terms. Whenever a thing cannot be done, or carried, or secured, that thing is, for the purposes of that contract, non-existent. It cannot be put to the expected use. I agree to deliver a certain ship to a purchaser. If the ship is burned up, I am ordinarily excused. But if the ship exists, and I cannot deliver because I cannot get her, then I have broken my contract. It will not do for me to say, "I cannot get this ship to deliver to you; therefore the ship is, for our purposes, non-existent, and therefore our contract is at an end." Any case of impossibility, almost any case of breach, might be described in similar terms. Such a figurative phrase does not conduce to clear thinking and does not advance us in the solution of the problem. Where there is truly destruction of the subject-matter, a peculiar situation is created which the law, as the fairest solution, usually deals with by declaring the contract annulled. But where, the subject-matter being intact, an obstacle arises to the performance by one party, the question is: Is the nature of the obstacle such that, under the law or according to the provisions of the contract, the

default is excused? The law both of this country and of England is that prevention by foreign law does not excuse. Unless, therefore, well-settled law be overruled or unless an exception to the ordinary rule be created, the respondents are not absolved from liability by the act of the British Government.

It seems unnecessary to refer more particularly to the extract from the Defense of the Realm Act, pleaded in the answers, folios 32-33, and printed in the record at pages 206, 207. It declares that where performance of a contract is interfered with by any requirement of the Admiralty, etc., that fact shall constitute a defense. Of course the statute has no effect on an American contract in suit before an American court. The same observations apply to the Courts (Emergency Powers) Act, printed at pages 208-213.

SECOND.

There was no frustration of the charter.

The contention of the respondents will doubtless be that, admitting that foreign law is not a defense ordinarily, still the principle of frustration applies, and that such frustration may result from the act of a foreign government or from foreign law as well as in any other way.

The general principle is unquestionably as stated in the last point—namely, that an absolute obligation must be performed unless prevented by destruction of the subject-matter, domestic law, or the act of the other party. If the doctrine of frus-

tration is applied to cases where performance is prevented by foreign law, then either the general rule must be overturned (which is inconceivable) or else such cases must be treated as exceptions to the general rule, in which case the burden is on the respondents to bring the case clearly within the exception.

The doctrine of frustration appears to have come into being to correct what was felt to be the injustice of enforcing a contract under circumstances fundamentally different from those which the parties foresaw or could reasonably have been expected to foresee. It is perhaps a broader expression of the fundamental idea which underlies the rule that destruction of the subject-matter annuls a contract. Manifestly, it is to be applied with great caution. The Courts have usually sought to express the doctrine as one of "implied condition" in the contract; or as an attempt to effectuate what the Court believes to be the intent of the parties—*i. e.*, to write the contract as the Court thinks that the parties would have written it if they had framed a provision designed expressly to cover the contingency which actually arose. In spite of these attempts by the use of conventional phraseology to bring the doctrine of frustration within the general powers of the Court and to make it appear that the Court is merely construing and enforcing a contract already made by the parties, the plain fact is that the Court is making for the parties a new contract; or, perhaps more accurately, declining to enforce, for equitable reasons, the contract which the parties themselves have made.

The general rule is that absolute obligations must be enforced. To relax this rule unduly is, obviously, to extinguish the obligation of contracts.

Only in a case of the plainest need should the exception be applied. Where the parties must have had the contingency in contemplation and simply failed to provide for it, the Court cannot annul the contract.

It should be borne in mind that most of the cases of frustration are cases where *domestic* law has intervened and made performance impossible. In all the English requisition cases that was the situation. In *The Allanwilde,* 248 U. S., 377, that was the situation. All of these cases fall within the general and universal rule that prevention by domestic law is an excuse. Moreover, in nearly every case a restraints of princes clause was present; and the parties thus manifested their intent that in the event of such interferences there should be no liability.

In previous cases, too, it has been proved to the satisfaction of the Court, either by the evidence of witnesses or by the inherent nature of the detention, that it would in all probability last for indefinitely and unreasonably long periods.

In no case has the defense of frustration been upheld where the situation has been what it is here: (1) American contract sought to be terminated by foreign law; (2) charter made in contemplation of an existing war; (3) no restraints clause; (4) no evidence that the requisition would be prolonged; (5) requisition occurring five weeks before the cancelling date, with some intimation that it would continue for a few weeks only; (6) a charter which required the ship to tender even if she was behind her cancelling date; (7) voluntary fixture by the owner for a six or seven months' service; (8) total repudiation of the charter *at once.*

In order to succeed under the facts of this case, the respondents must establish that the *mere fact* of requisition, *ipso facto* and without more, as matter of law, terminated the charter. Without an exception, without proof of the probable length of the requisition, without any facts in the record from which the Court can reach a conclusion about its probable length, there is nothing here but the mere fact that the vessel *was requisitioned*. No case has ever held that this alone is enough to accomplish frustration; several cases have held the contrary.

In the case of *Admiral Shipping Co.* v. *Weidner & Co.*, 13 Asp. M. C., 246, at 249, Mr. Justice Bailhache gave the following definition of frustration, which has since received judicial approval in other courts:

"The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so *inordinately postponed* that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made."

Apply this to the case at bar: (1) The libelant's purpose was to get oil carried; the respondents' was to earn freight. Neither of these objects would be frustrated by delay. (2) The delay was certainly not "unforeseen." All the world knew, when

this charter was signed, that requisitions were common enough. (3) There is no evidence that the fulfilment would have been "inordinately" postponed, or that any postponement would in the slightest degree have affected the objects which the parties had in view. The case does not in the least fall within the definition.

The fundamental test under this definition is the effect on the contract of the probable delay involved. That is the question chiefly considered in all the frustration cases. A contract is never held to be dissolved unless the delay is plainly going to be so long as to make the contract a different contract and to defeat the objects of the parties. Thus in the leading case of *Jackson* v. *Union Marine Ins. Co.*, L. R. 8 C. P., 572; L. R. 10 C. P., 125, a vessel en route to her loading port stranded on January 3rd, was floated on January 4th, very badly damaged, and was still under repair at the time of the trial in August. The jury found that the delay was so long as to make it unreasonable to require the charterer to furnish a cargo after repairs were finished, and on this finding the Court held that the shipowner could not enforce the charter. In the Exchequer Chamber the ground of decision is stated as follows by Bramwell, B.:

"I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage; not, indeed, different as to the ports of loading and discharge, but different as a different adventure—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship nor the charterers the cargo; a voyage as different as though it had been described

as intended to be a spring voyage, while the one after the repair would be an autumn voyage."

As was said by Viscount Haldane in *Bank Line v. Capel & Co.*, 35 T. L. R., 150; 14 Asp. M. Cas., 370:

"Whether frustration has taken place is always a question which depends on the circumstances to which the principle is to be applied, rather than upon abstract considerations."

The question must, therefore, be decided on the facts of each case; but frustration is not lightly to be found. Lord Sumner in the *Bank Line* case, *supra*, puts it accurately in saying that:

"When the causes of frustration have operated so long or under such circumstances as to raise a presumption of *inordinate delay*, the time has arrived at which the fate of the contract falls to be decided."

In other words, requisition alone is not enough. Either the frustrating causes must operate for a long time or the circumstances must be such as to make it plain that they will so operate as to produce "inordinate delay." There are no facts in this case on which such a finding could be based.

These tests seem to have been applied consistently in the cases. In the case of *F. A. Tamplin SS. Co. v. Anglo-Mexican Co.*, 1916, 2 App. Cas., 397; 13 Asp. M. C., 467, Lord Loreburn said:

"I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on."

On the other hand, where it has been clear that the delay must of necessity last for *the entire period of a war*, the contract has been generally held frustrated. In *Geipel* v. *Smith*, L. R. 7 Q. B., 404, Lush, J., said:

"A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial venture like this."

So where a British vessel was in a Baltic port at the outbreak of the recent war, it was said (per Swinfen Eady, L. J.) that "the enforced delay by reason of the war is of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense." (*Admiral Shipping Co.* v. *Weidner & Co.*, 1917, 1 K. B., 222; 13 Asp. M. C., 539; *Scottish Navigation Co.* v. *W. A. Souter & Co.*, 1917, 1 K. B., 222; 13 Asp. M. C., 539.) There the delay had already lasted for some three months before the matter of frustration was brought up.

In the American cases also the test of probable duration is the decisive one. It was so held both by this Court in *The Allanwilde*, 248 U. S., 377, and by the Circuit Court of Appeals for the Second Circuit in *Earn Line* v. *Sutherland SS. Co.*, 264 Fed., 276. In *The Allanwilde*, the Government had forbidden the clearance of sailing vessels for the war zone because of the submarine danger. The *Allanwilde* was bound from New York for France. This Court said at page 386:

"The duration was of indefinite extent. Necessarily the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there

could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending on it."

To the same effect:

Geipel v. *Smith, supra.*

Here there was no reason to expect detention for the duration of the war. In fact the vessel was released as soon as she finished the four voyages for which her owner committed her. In other cases—*e. g., Modern Transp. Co.* v. *Duneric SS. Co.*, 1917, 1 K. B., 370—vessels were released after short periods of service. Other instances appear in the case of *Chinese Mining Co.* v. *Sale*, L. R. 1917, 2 K. B., 599; 22 Com. Cas., 352. There the steamer *Albiana* was requisitioned in July, 1915, released in September, and not again requisitioned until December, 1916. The *Wimbledon* was requisitioned in August, 1914, released in December, 1914, and again taken in January, 1916. These instances show that the release of the *Baron Ogilvy* after two months' service was quite possible. That would have been on June 10th, less than a month after the cancelling date.

On the other hand, where it has been proved as a fact that there is no likelihood of the ship's release for an inordinately long period, frustration has been found. This was the case in *Countess of Warwick SS. Co.* v. *Le Nickel Societe Anonyme* and *Anglo-Northern Trading Co.* v. *Emlyn, Jones & Williams*, 1918, 1 K. B., 372; 14 Asp. M. Cas., 242. There it was proved by the testimony of shipping experts that there was no hope of the vessel's release until the war was ended.

In *Bank Line* v. *Capel & Co.*, 35 T. L. R., 150, the charter was for twelve months. The vessel was requisitioned at about the time when she would have entered upon performance. It was held by a divided court that the charter was terminated because detention had already lasted so long (about four months) as to make performance at its termination performance of a different contract. Lord Wrenbury expressed the opinion (p. 156) that the contract would continue for a reasonable time—say two months—but that four months was more than a reasonable time.

In *Earn Line* v. *Sutherland SS. Co., Ltd.*, 264 Fed., 276, a case of time charter, it was proved as a fact, and so found by the Court, that "in January-February, 1917, having regard to the then violence of German submarine warfare on merchant vessels, and the success thereof, no reasonable man would have expected or even dared hope that the *Claveresk*, once taken into Government service, would be released for any use contemplated by the charter of 1913, before the expiry of the term of that charter."

That finding was the basis of the decision. The Court did not hold, nor, it is submitted, can any court reasonably hold, that *the mere fact of requisition*, without more, extinguishes such a charter as this. It is a question of proof as to whether performance has become so clearly and hopelessly remote as to warrant the Court in putting into the contract a new condition and calling it frustrated.

The following cases indicate that even prolonged detention or absolute change of circumstance does not of necessity bring about frustration.

In *Blackburn Bobbin Co.* v. *Allen Co.*, 23 Com. Cas., 271, a contract was made before the war for sale of a quantity of Finland timber. The outbreak of war made the importation of such timber impossible. The sellers claimed that the contract had been dissolved by the outbreak of the war. The opinion of the Court (McCardie, J.) discusses the doctrine of impossibility of performance at great length and holds that the contract in suit was not extinguished by the outbreak of the war. His decision was affirmed by the Court of Appeal (23 Com. Cas., 471).

In *Hudson* v. *Hill*, 2 Asp. N. C., 278; 43 L. J. C. P., 273, there was a voyage charter under which lay days were to begin on April 1st. Owing to bad weather and other difficulties, the vessel did not reach the loading port until July 28th. Held, no frustration—charterer must load.

To the same effect is *Jones* v. *Holm*, 2 Ex., 335, where a vessel, after arrival at the loading port in March, took fire and was not repaired until July 30th. It was held that the charterer was bound to load and that the charter was not ended.

So in *The Progeso*, 50 Fed., 835, it was held that a delay of a month, due to quarantine, did not terminate the charter. The charter was a voyage charter and the charterer had an option to cancel if the vessel did not arrive on or before October 1st. There was a restraints clause. The authorities at the loading port imposed a quarantine which extended for a month beyond the cancelling date. It was held that the charter was not thereby terminated and that the shipowner was liable for refusing to perform.

And see:

The Star of Hope, 1 Hask., 36; F. C. 13312.
Hadley v. *Clarke*, 6 Term. R., 259.
Lazarus, Insurance of Freight, 135, 136.
The Patria, L. R. 3 Adm. & Ecc. (where even a blockade of the port of destination was held not to terminate a charter).
Hurst v. *Usborne*, 25 L. J. C. P., 209; 18 C. B., 141 (delay of several months in reaching loading port did not frustrate).
Assicurazioni Generali & Co. v. *Bessie Morris SS. Co.*, 7 Asp. M. C., 217; 1892, 2 Q. B., 652 (where stranding, partial submergence of the vessel and delay of nearly two months for repairs did not frustrate).
Clark v. *Mass. Fire & Marine Ins. Co.*, 2 Pick., 104 (where delay of two months for repair, causing the charterer to lose the object of the voyage, did not frustrate).

In 3 Kent Com., 14 Ed., Sec. 249, it is said:

"But a temporary impediment of the voyage does not work a dissolution of the charterparty; and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time. The same construction is given to the legal operation of a hostile blockade, or investment of the port of departure, upon the contract. It merely suspends the performance of it, and the voyage must be broken up or the completion of it become unlawful, before the contract will be dissolved. If the cargo be not of a perishable nature, and can

endure the delay, then the general principle applies that nothing but occurrences which prevent absolutely the execution of the contract will discharge it. The parties must wait until those which merely retard its execution are removed."

That the mere fact of requisition is not enough is shown (if proof be needed) by the cases where charters have been held to survive requisition—*e. g.*, *Tamplin Co.* v. *Anglo-Mexican Co.*, 2 App. Cas., 397; *Modern Transp. Co.* v. *Duncrie SS. Co.*, 1917, 1 K. B., 370; *Chinese Mining Co.* v. *Sale*, 1917, 2 K. B., 599; 22 Com. Cas., 352.

If a physical obstacle to the performance of a charter arise—such as stranding or collision—which may or may not cause long detention, no one would claim that the charter is ended without some evidence as to the probable duration of the delay. Why is it different with a legal obstacle? In case of the stranding or collision, the delay would be excused if the charter contained a suitable exception, but the obligation to perform would persist unless and until it became evident that extraordinary delay would ensue. The present, too, is a particularly strong case because the cancelling clause (quoted above, pp. 3, 4) plainly indicates that even though the ship might be delayed beyond her cancelling date, it was the duty of the owner to tender her at the loading port, and that the charterer was then entitled to make its election as to cancellation. Moreover, the cancelling date was still five weeks away. Yet here the owners absolutely and finally repudiated the charter as soon as the requisition telegram was received.

All the decisions turn on the probable duration of the requisition. Either this is established by

evidence or, if sufficient information appears in the record, is found by the Court from the circumstances. Unless in one way or another it appears that the requisition will last for an unreasonably long time, the contract stands unaffected. So in *Modern Transportation Co.* v. *Duneric SS. Co.*, 1917, 1 K. B., 370; 13 Asp. M. C., 490, the charter was for a year. The vessel was requisitioned after five months' service and released after six months. It was held that the charter was not ended.

In *Miller & Co.* v. *Taylor & Co.*, 32 T. L. R., 161; L. R., 1916; 1 K. B., 402, the contract was for the purchase of confectionery for export, delivery to be in August and September, 1914. War began on August 4, 1914. On August 10, the Government forbade the export of sugar; on August 14, the plaintiffs (vendors) cancelled the contract. On August 20, the embargo on sugar was lifted. The plaintiffs claimed that the contract was destroyed by the embargo; but the Court of Appeal unanimously held the contrary, saying:

"In the present case, if the interruption had been such that the contracts could not be carried out within a reasonable time, that would have sufficed to invalidate the contracts. If, on the other hand, the interruption was not such as to have that effect, there was not such an interruption as would annul the contracts. The contracts here were to manufacture goods in a reasonable time. No time was specified in the contracts, and the usual course of business between the parties was that goods should be delivered within six or eight weeks. The duty of the plaintiffs after the Proclamations of August 5 and 10 was to wait a reasonable time to see if they could carry out the contracts, and if they had done this the result would have been that

the contracts would have been duly carried out. The suspension of the power to export confectionery was for a very short period, and would not have prevented the contracts from being carried out in the manner contemplated by the parties."

This case, while recognizing the principle of frustration, declines to apply it where it is not shown that frustration has really taken place. It stands for the proposition that reasonable inquiry must be made and the probable long duration of the obstruction be clearly established before a case of frustration arises.

It is said in some cases that the rights of the parties should, for reasons of commercial convenience, be determined *eo instanti*, and that they should not be obliged to wait, in uncertainty as to their rights, for a long period. Everyone will agree that this is desirable. But it does not at all follow that either party is entitled, the moment he hears of the obstacle, to repudiate all responsibility without evidence and without inquiry as to whether there is really going to be a frustration or not. The statement sometimes made that the rights of the parties are fixed *eo instanti* does not mean that there is always a frustration, nor does it mean that either party may on the instant take it for granted that there is a frustration without waiting long enough to make an intelligent effort to find out. Still less does it mean that one party is at liberty to make such a voluntary fixture as was made here and thereby cut off all possibility of an early release.

Turn the case around. Suppose that the petitioner, hearing that the *Baron Ogilvy* had been requisitioned, had instantly cabled the respondents that it considered the charter at an end. Suppose

then that the respondents had succeeded in procuring the vessel's release and had tendered her at the loading port by May 15. The petitioner would certainly have been liable if it refused to load her. It would be impossible for it to justify a repudiation of the charter based on nothing but the mere fact of a requisition. Certainly, if either party is bound, then both are.

In considering this case, it must be remembered that it came up early in the war. At that time there was not the terrible scarcity of tonnage that occurred two years later. In early 1915, when the *Baron Ogilvy* was requisitioned, there was no serious shortage of vessels and indeed the *Baron Ogilvy* herself was released as soon as the four voyages were finished.

The cases where frustration has been found fall into two classes: (1) Where the attendant circumstances show that the detention is bound to be inordinately long—*i. e.*, where it will of necessity last as long as a war lasts; (2) where facts are proved which show that it will last inordinately long—*e. g.*, where there is damage which cannot be repaired for a long time or where there is evidence that a requisitioned ship is certain to be kept for a long period. Unless in one or the other of these ways the length of the detention is made manifest, the Court will not overthrow the contract of the parties. The present case does not fall within either of the classes referred to; and contracts should be set aside only when the circumstances very clearly require it. The doctrine of frustration is a dangerous one. It is applicable only when the Court can clearly say that, if the parties had expressly dealt with the situation presented, they

would have done so by abrogating the contract. As Lord Sumner said in *Bank Line* v. *Capel & Co.*, 1919 A. C., 435, at 460:

"The danger in each case so put is that the jury will think that the contract is as wax in their hands. A. T. Lawrence, J., puts the matter very usefully thus in Souter's case, 1917, 1 K. B. at p. 249: '*No such condition (i. e., that the contract is to be considered at an end) should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.*'" (Italics ours.)

In *Comptoir Commercial Andersois* v. *Power Son & Co.*, 36 T. L. R., 101, it was held that a contract for the sale and shipment of wheat was not dissolved by the fact that war had broken out and that it was impossible to secure insurance against war risks and consequently to sell exchange, which was the customary method of financing such a transaction. In holding that no defense was established, Lord Justice Scrutton said (36 T. L. R., 105):

"They (the courts) ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; *it must be such a necessary term that both parties must have intended that it should be a term of the contract and must have only not expressed it, because its necessity was so obvious that it was taken for granted.*" (Italics ours.)

If this Court is seeking to ascertain and apply the presumed intent of the parties, how can the Court find on the present record that the charter is terminated? If it had been foreseen that, five weeks prior to May 15th, the British Government, desiring vessels "for some weeks" to carry hay, would take the *Baron Ogilvy*, what reason is there to suppose that the petitioner would have said that it did not want the ship at all? Tonnage was not plentiful, rates were rising (fols. 185, 209); in all human probability the petitioner would have said just the opposite—that even if the ship would not be ready by her cancelling date, she must report for loading in accordance with the charter and that she would be used.

It must also be borne in mind that the owners deliberately put it out of their power to perform the charter for six or seven months. The ship might have been released from the original requisition in a few weeks. They deliberately made it certain that she would not be. Surely a man cannot, by his own act and for his own advantage, change an indefinite detention of possibly very short duration into a definite detention of certainly long duration, and then use the condition thus created by himself as a reason why he should be excused from his contract. The respondents first tied up their vessel for four round trips and then immediately repudiated all obligations. They might have said: "We are prevented for the moment from performing; but, if the restraint is lifted within any reasonable time, we will at once carry out our agreement." This would be the course required by the authorities discussed above. They might at least have made inquiries as to the probable duration of the requisition before they

threw up the charter. Instead, on the very same day, they fixed the ship for a prolonged period and said: "We will have nothing more to do with you." Even if an excuse exists in so far as there is a Government restraint, it surely ceases when an owner voluntarily subjects himself to a greater and longer restraint than he has to, and does it to get better rates.

The respondents have not proved that the requisition caused such an interruption of the vessel's service as to terminate the charter. They have merely proved a requisition of uncertain but apparently moderate, probable duration, *for which they chose to substitute a voluntary engagement* for an extended period. No decision has ever upheld such a defense.

Courts should not apply the doctrine of frustration save in the clearest cases. These parties had in view the possibility of requisition; yet they made their contract absolute. The charterer stipulated that the ship should report for loading even after the cancelling date—it evidently wanted her whenever it could get her. What power has a Court to deprive the charterer of the right for which it expressly stipulated—that the ship should report for loading whether she arrived early or late? This question came up in *The Progreso*, 50 Fed., 835, where the Circuit Court of Appeals for the Third Circuit held that under a similar clause it was the duty of the vessel to tender under the charter, even though it could not be done for more than a month after the cancelling date. The Court said:

"The transportation of the cotton was the object to be attained. Whether that transportation com-

menced on October 1st or November 1st was not as material as that the cotton should be transported. This is evidenced by the fact that delay in arriving at the port of lading did not avoid the contract by its terms, but such avoidance for such cause lay solely in the discretion of the charterers."

Nothing in this record warrants a finding that the charter could not have been performed within a reasonable time, had not the respondents prevented it by engaging for four voyages. The case is not within either the rule or the reason of the rule which the decisions on frustration have laid down.

THIRD.

The alleged requisition was not in reality a legally valid requisition; and the diplomatic officers of a foreign government cannot, by *ex parte* statements, preclude the Courts of the United States from ascertaining the true facts; nor should the Courts of the United States receive or act on such statements, at least unless made through and with the sanction of the Department of State.

As already pointed out, the only act done by way of requisition was the sending of the following telegram (fol. 538):

"Hogarth Glasgow S S *Baron Ogilvy* is requisitioned under Royal proclamation for government service."

The Royal proclamation referred to, which appears at pages 204-205, authorizes the Lords Commissioners of the Admiralty,

"by warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty, to requisition and take up for Our service any British ship," etc.

The telegram was sent by a Mr. Foley, a subordinate official in the service of the British Admiralty.

1. *The telegram did not constitute a valid requisition.*

The requisitioning telegram by its own terms was grounded upon the proclamation. No warrant or other action of the Secretary of the Lords Commissioners of the Admiralty or of any Flag Officer was ever taken. The requisition obviously and on its face was wholly outside the authority of the very document on which it purported to be based. The evidence of Sir Henry Erle Richards, who testified orally at pages 120 to 131, and whose written opinion appears at page 159, is to the effect that requisition by means of the telegram in question was not a valid action under the proclamation, and was not otherwise valid. It appeared from the evidence of Mr. Foley, who was assistant to the Director of Transports (fol. 235), that ordinarily an official requisitioning letter was sent (fol. 245), but that this was not done in the present case. Such a letter, if signed by one of the persons designated in the proclamation, would be, no doubt, a valid requisition. There was, however,

nothing in the nature of the "warrant" required by the proclamation (fol. 257). It was the opinion of Sir Henry Erle Richards that under these circumstances there was no valid requisition (fols. 478-479). In answer to the contention that the requisition might be supported as an exercise of the prerogative of the Crown apart from the proclamation, he points out (1) that the telegram "purports to derive authority from the proclamation and not from the prerogative alone"; (2) that the prerogative of the Crown cannot be exercised by any subordinate, but must be exercised by "an official of high rank or an official specially authorized. Mr. Foley himself without special authority could not exercise the prerogative and, as I have pointed out, he did not purport to do so" (fol. 479).

2. *The British Embassy's certificate and suggestion should not have been received, unless through the State Department, and could not preclude the Courts of the United States from ascertaining the true facts or from adjudicating the rights of private litigants in accordance with the facts thus ascertained.*

It was sought by the respondents to avoid any examination into the alleged requisition and its effect by the device of a suggestion and certificate from the British Embassy. Although the parties to this litigation are private persons and although no relief is asked for against the British Government, still the diplomatic officers of that government have intervened and sought by an *ex parte* statement, not under oath, not subject to cross-examination, and not dealing with facts of which they have any personal knowledge, to determine

conclusively issues both of fact and of law, and to compel the Courts of this country to accept such determination without question. A similar procedure has been acquiesced in other cases by the Circuit Courts of Appeals of the Second and the Third Circuits (see *The Carlo Poma*, 259 Fed., 369; *Agency of Canadian Car Co.* v. *American Can Co.*, 258 Fed., 363; *Earn Line Steamship Co.* v. *Sutherland Steamship Co.*, 264 Fed., 276; *The Adriatic*, 258 Fed., 902), and it has thus come about that American litigants in those courts find a deaf ear turned to their evidence and their arguments because a foreign government has chosen to inject itself into the litigation and in effect to dictate to the Court certain conclusions of fact and law.

In the present case the respondents are claiming that the act of foreign law prevented their performing their contract. It is certainly open to the Court to ascertain whether or not that is true. That inquiry necessarily involves determining whether foreign law did in fact interfere with the respondents' control of the *Baron Ogilvy*, and it is most earnestly urged that the *ex parte* statement of a foreign official to an American Court cannot possibly shut the eyes of the Court and foreclose the rights of an American litigant. It is submitted that it is nothing short of monstrous to hold that such suggestion and certificate are conclusive. It would be to confer upon foreign diplomatic representatives an almost unparalleled standing in court and to give them power which might, on occasion, give rise to serious abuse.

Such action would mean that, in any suit in which a foreign government might claim to be interested, its diplomatic representative might present to the Court an *ex parte* certificate as to con-

troversial facts and that the statements contained in such a certificate would be conclusive on the Court.

The well-recognized diplomatic practice is that all communications from foreign governments and their representatives are addressed to the Secretary of State, who, subject to the direction of the President, has exclusive jurisdiction over such matters. The following statement of this rule may be quoted from the despatch of Secretary Seward to Mr. Dayton, Minister to France, June 27, 1862 (4 *Moore's Inter. Law Digest*, 686):

"This Department is the legal organ of communication between the President of the United States and foreign countries. All foreign powers recognize it and transmit their communications to it, through the dispatches of our ministers abroad, or their own diplomatic representatives residing near this Government. These communications are submitted to the President, and, when proper, are replied to under his direction by the Secretary of State."

And conversely:

"It is not regular for any other authority than that of the department of foreign affairs in the country where diplomatists are accredited to address letters upon public business directly to them. When such other authority has occasion to communicate with them, this is invariably done through the department intrusted with the foreign relations of the country" (Mr. Fish, Sec. of State, to Mr. Cox, Jan. 22, 1874, 101 MS. Dom. Let. 165).

In *The Luigi*, 230 Fed., 493, where a vessel was libeled for breach of charter and counsel representing the Italian Government appeared and "suggested" that the vessel be released, as a public

vessel in the service of the Italian Government, the Court (District Court, Eastern District of Pennsylvania, Thompson, J.) said:

"The Court was of the opinion that inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government."

The Court accordingly refused to receive the suggestion, until it was renewed by the District Attorney, "at the instance of the Attorney General."

In *The Florence H.*, 248 Fed., 1012, a suit for collision, it was, on behalf of the Republic of France, suggested that, as the vessel and crew were in the employ of the French Government, the Court should not take jurisdiction. The Court said:

"A suggestion from the Secretary of State would be one thing, since he is charged with the responsibility for our relations with other powers. But a court which is not authorized to treat in any fashion with foreign powers should be in consequence quite inaccessible to any suggestion which is based upon international considerations."

So in the case of *The Isle of Mull*, 257 Fed., 798, where an appearance and certificate similar to those in the case at bar were offered in a similar case on behalf of the British Government, Judge Rose refused to receive them and said (Stenographer's Minutes, p. 29):

"I cannot feel that a question of disputed fact between parties one of them a citizen of this country and one a citizen of England should be tried *ex parte* before the British Ambassador and decided *ex parte* by me. There is a difference of opinion among the experts as to what was done

and you are at the instance of one of the parties having an *ex parte* trial of that question disputed in England before some one in the foreign office and the foreign office issues this certificate, which precludes further examination of the subject."

The undesirability of such practice could hardly be better expressed. Judge Rose also pointed out (Stenographer's Minutes, pp. 2 and 3) that the embarrassment which a court would feel in holding such a certificate to be untrue made it, in his opinion, the only safe rule to have the State Department first investigate the question and that then, if the suggestion comes to the Court, accompanied by a similar suggestion from the State Department, it might be received and held decisive.

In *South Carolina* v. *Wesley*, 155 U. S., 542, which was a suit for possession of certain land, the Attorney General of the State of South Carolina filed a suggestion to the effect that the property in question was occupied by the State for public purposes and asked that the suit be dismissed. The trial court denied this application, and the case was taken by writ or error to this Court. In dismissing the writ of error, this Court said:

"The record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion. United States v. Peters, 5 Cranch, 115; The Exchange, 7 Cranch, 116; Osborn v. Bank of the United States, 9 Wheat, 738; United States v. Lee, 106 U. S., 196; Stanley v. Schwalby, 147 U. S., 508."

If such suggestions are to be received at all, and particularly if they are to be given any conclusive

effect, it is submitted that the Court should require that they come through the State Department and that they be supported by the result of that Department's inquiry.

It is further submitted that the importance of having the proper procedure settled and the proper effect of such certificates determined is very great; and that this matter alone is sufficient to make it appropriate to grant *certiorari* herein.

In the Courts below certain authorities were cited as establishing that both this Court and the Courts of England uphold the practice of receiving such certificates and their conclusiveness. It is submitted that the cases referred to, which are briefly considered below, do not support any such propositions.

In *United States* v. *Peters*, 3 Dall., 121, a libel was filed for damages against a vessel commissioned by the French Government, for the alleged capture of a vessel of the United States. These facts appeared from an affidavit of the master of the French vessel, who moved for prohibition and, the motion having been heard on the proof thus offered, and *there being no dispute as to the facts*, the motion was granted. The case stands for nothing more than the proposition that a libel against a public vessel commissioned by a foreign government will be stayed by a prohibition upon application made by affidavit *where the facts are undisputed*.

The Exchange, 7 Cranch., 116, holds simply that a foreign public vessel is not subject to the jurisdiction of the United States courts. In that case the facts were made to appear by the intervention of the United States District Attorney *at the in-*

stance of "the Executive Department of the Government of the United States," who filed a suggestion stating the facts. The commission from the French Government under which the vessel sailed was also produced and supported by affidavits of the master and of the French Consul. It therefore appeared both by the certificate of the proper officer of the United States and by affidavits what the character of the vessel was and her flag, commission and possession by French officers were all proved by competent evidence, and not merely by the suggestion of a foreign government. Here again there was *no dispute about the facts.*

In *Dupont* v. *Pichon*, 4 Dall., 321, the question was as to the immunity from arrest of the French *chargé d'affaires.* His official character was proved (1) by the production of his credentials and (2) by the taking of his deposition. Even with that proof, the Chief Justice "seemed inclined to wait for information from the Department of State, as to his actual reception by the President in that character." But, since it appeared that to wait for this would involve imprisoning him in the interim, the Court finally discharged him.

In *The Parlement Belge*, L. R. 5 P. D., 197, the facts as to the character of the vessel appeared from an intervention of the Attorney General. In that case, therefore, the Court had the certificate of the proper officer of its own government before it.

The Constitution, L. R. 4 P. D., 39, is the only one of the cases referred to where a foreign representative appears to have communicated directly

with the Court. There the Minister of the United States wrote to his solicitors a letter which was read to and considered by the Court. The Admiralty Advocate representing the British Government also intervened and protested against the exercise of jurisdiction, so that the Court again had the representative of its own government before it. Here also the facts were not disputed.

In *The Crimdon*, 35 T. L. R., 81, the Court held that a Swedish steamship under time charter to the United States Shipping Board Emergency Fleet Corporation was not subject to process. There the facts appeared by an affidavit to which were attached letters, the nature of which does not appear from the report, but which apparently stated the facts as to the employment of the vessel. These facts were not disputed.

The foregoing cases indicate that the practice of communicating directly with the Court and of claiming that the Court is bound by such communication is not supported by the cases in the Supreme Court and the English courts referred to. It is also to be observed that in the present case there is very much more than a certificate of a mere fact. There is presented to the Court a statement involving conclusions both of fact and of law. There is also before the Court evidence showing what the true facts are, *i. e.*, that the vessel was employed under a voluntary charter.

The British Embassy seemingly denies the right of our Courts to examine and construe the Royal Proclamation and the acts purporting to be done thereunder. Yet in *King* v. *Delaware Insurance Co.*, 6 Cranch, 71, where an American vessel was warned by a British warship not to go to her des

tination on account of a blockade, this Court examined and construed the British Orders in Council and held that they did not prohibit the voyage in question and that therefore there was not a restraint of princes within the meaning of a policy of insurance on the freights. Surely that case would not have been decided differently if the British Embassy had avowed the act of the warship. So in *Corp* v. *United Insurance Co.*, 8 Johns., 277, an unauthorized threat of capture from a British cruiser was held not to constitute a restraint of princes under an insurance policy. These are clearly cases where acts done by the officials of foreign governments have been held unauthorized and therefore inoperative.

FOURTH.

The suggestion and certificate of the British Embassy do not state that the vessel was under requisition during the period in question.

When closely examined, it will be seen that the suggestion and certificate were carefully drawn and do not, in fact, allege that the vessel was *under requisition* during the months from April to October, 1915. They set forth, in nearly the same language (fols. 126-130), that the vessel was requisitioned on April 10, 1915, but they do not say that she remained under requisition. They go on to allege

"that the period of the said requisition was indefinite; and that from and after the date of requisition the steamship *Baron Ogilvy* was continually in the

service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915."

Consistently with this allegation there may have been a special voluntary charter for certain voyages in lieu of requisition, and the evidence already examined shows that this was undisputedly the fact. In place of the requisition, a voluntary contract for four voyages was made. Therefore, even if the full effect contended for be given to the suggestion and certificate, they do not establish that the vessel was operated under requisition during the intervening months, but merely that she was requisitioned on April 10th and was thereafter operated in the service and under the orders of the Admiralty, a service which the other evidence shows to have been simply a contract of carriage. The making by the respondents of such a contract of carriage was a breach of its charter with the petitioner.

FIFTH.

The respondents after the happening of the alleged requisition did not make efforts to secure the release of the vessel or to substitute other tonnage.

It is admitted by the respondent Hogarth (fols. 181, 182, 190, 191, 194) that no attempt whatever was made to secure the release of the *Baron Ogilvy* from requisition or to shorten the period of requisition, or to get the Admiralty to take, in place of the *Baron Ogilvy*, one of the other unrequisitioned vessels of the same fleet. The Court below held

that the respondents were under no obligation to make any such effort (fol. 705). It is submitted that this was error. The law is plain that if a ship strands or is in collision or encounters any other similar obstacle, her owner must use all reasonable means to repair her and to make her ready to perform her charters as quickly as reasonably possible. There is no ground for applying a different rule to a case of requisition. If the owner can by reasonable efforts secure the release of the vessel or the shortening of the requisition period, he ought to do so. It is common knowledge that many such releases were secured on application, especially in the early part of the war. In the present case the owners made no effort whatever of this kind.

Nor did the owners make any efforts to substitute any other vessel. The charter is peculiar in its phraseology. It recites (fol. 449) that it is "made between J. H. Winchester & Co., Inc., * * * agents for owners of a first-class steam vessel owned by Messrs. Hugh Hogarth & Sons of Glasgow, and name of vessel to be declared on or before March 15th, 1915," etc. It appears from the evidence that the *Baron Ogilvy* was not owned by Hugh Hogarth & Sons, but by Hogarth Shipping Company, Ltd., although Hugh Hogarth & Sons were the agents and apparently the managers of the owner. There were other vessels not under requisition belonging to the same fleet. The Hogarth Shipping Company and the Kelvin Company, both controlled by Hugh Hogarth & Sons, owned between them about twenty vessels, of which eight appeared to have been under requisition at the time (fols. 139-140). Where the charter is for one vessel of a certain fleet and where the vessel named encounters such an obstacle, it

would seem that an obligation fairly arises to furnish another vessel within a reasonable time. Thus, in *Williams* v. *Vanderbilt*, 28 N. Y., 217, a steamship owner contracted to carry the plaintiff from New York to San Francisco, and the steamer *North America* was named as the vessel to perform the first stage of the voyage. She was lost, and the shipowner contended that that discharged him from his obligation; but the Court held that the identity of the vessel was a mere incident of the main object of the contract; that the contract could be substantially carried into effect by the use of another vessel, and that the shipowner was liable. It is submitted that the same ruling should apply to the present situation.

CONCLUSION.

It is submitted that the main questions arising in this litigation are of sufficient importance to call for the final determination of this Court, affecting as they do other pending litigations and many similar instances of broken charters, and involving as they do questions of international relations. As the law has been left by the Circuit Court of Appeals in this case, the act of a foreign government in requisitioning a vessel destroys the obligation of an American contract, although that contract was made in contemplation of that possibility, and although the parties failed to provide for it by any exception and on the contrary omitted the usual exception of restraints of princes. The hitherto well settled rule that prevention by foreign law is not a defense to a suit for breach of contract seems also to be overthrown. The question of the

standing of a foreign ambassador in our courts has come up in numerous cases in the lower courts and ought to be finally settled. It ought to be finally determined how far such an ambassador can conclude the courts of the United States by his certificate.

It is respectfully submitted that the writ of certiorari should be granted as prayed for in the petition.

Dated, New York, September 8, 1920.

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